NO. 45328-2-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

JEREMY LOYD MCCRACKEN,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

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Procedural Background.

The defendant was charged by Information on April 17, 2013, with Assault in the Third Degree, RCW 9A.36.031(1)(g). (CP 1-2). A CrR 3.5 hearing was held on July 24, 2013. Following hearing, the court found that the out-of-court statements of the defendant were admissible and entered appropriate Findings of Fact and Conclusions of Law. (CP 3-6). The matter was tried to a jury commencing on July 30, 2013. The jury returned a verdict of guilty. (CP 11). The defendant was sentenced to serve three months in jail. (CP 12-20).

Factual Background.

On Monday, April 16, 2013, the defendant was present in Department 2 of the Grays Harbor Superior Court with his attorney, Edward Penoyar, for a hearing on the domestic docket. (RP 46). Dwight Combs, a deputy sheriff assigned to courthouse security, was present in the courtroom. (RP 44-45). David Haller, the director of courthouse security and also a deputy sheriff, was standing in the back of the courtroom. (RP 46). As Judge Edwards was making a ruling, Combs observed that the defendant was becoming increasingly irritated and

making comments that he did not feel that his attorney was doing a proper job. (RP 47). At one point, Judge Edwards admonished the defendant that if he did not remain quiet that he would be found in contempt. (RP 47). The defendant continued talking and raising his voice. Judge Edwards told the defendant that he was in contempt. (RP 47).

At the direction of the court, Combs walked over to the defendant and informed him that he was in custody and was being placed under arrest. (RP 48). The defendant pushed his chair back and responded, "You're not going to touch me," repeating that more than once. (RP 48). The defendant then headed for the doorway of the courtroom to leave. Deputy Combs went after him. (RP 48).

David Haller was standing near the door leading out of the courtroom. (RP 57). He had heard the defendant arguing with the Judge and heard Judge Edwards tell the defendant that he was in contempt. (RP 59). Haller observed Combs trying to speak quietly with the defendant. (RP 59). Haller approached the defendant as the defendant was trying to leave the courtroom, telling him to stop and that he was under arrest. (RP 61). As Deputy Haller reached out toward the defendant, the defendant turned toward Haller, threw his left fist and hit Haller in the chest. The defendant was yelling, "Nobody's touching me." (RP 61). Haller was

lifted off his feet and back into the court bench, then fell to the floor. (RP 61).

These events were observed by Cynthia Harris, and Amy Airhart, caseworkers with the Department of Social and Health Services, who were present in the courtroom at the time as well as Susan O'Brien, the court clerk. The account given by each, corroborated the events as described by Mr. Combs and Mr. Haller. (RP 67-69, 73-74, 83).

The defendant testified at trial. He testified that he did not remember being told by Deputy Combs that he was going to be taken into custody for contempt. (RP 88). The defendant denied assaulting Deputy Haller, claiming that he had turned and accidentally bumped into him. (RP 89-90).

Deputy Robert Wilson interviewed the defendant following his arrest. Deputy Wilson testified concerning the contents of the defendant's statements. By the defendant's account to Deputy Wilson, he had said two words in the courtroom and was immediately found in contempt. (RP 100). The defendant stated that Security Officer Haller then tried to grab him and he pulled away. (RP 100). The defendant claimed that at this point that he apologized to the officer. (RP 100-101). The defendant's

written statement was admitted at trial. (Exhibit 1). The cross-examination of the defendant concluded with the following questions. (RP 102-103).

> Q. (By Mr. Walker) Did you ask him if he was warned to stop talking in court?
> A. I did.
> Q. What did he say?
> A. He advised he was not.
> Q. Did you ask him if he was aware that the officer was placing him under arrest?
> A. I did.
> Q. What was his response?
> A. He advised that he wasn't aware that they were placing him under arrest.
> Q. Did you ask him if he struck the officer?
> A. I did.
> Q. What did he say?
> A. He didn't want to get into that was his statement. I don't want to get into that, was I believe the statement made.
> Mr. Walker: Thank you. Nothing further.

No further mention was made of this remark at trial.

RESPONSE TO ASSIGNMENTS OF ERROR

The testimony of Deputy Wilson was not a comment on the evidence. (Response to Assignment of Error No. 1)

The State acknowledges that a police witness may not comment on the silence of the defendant so as to infer guilt from a refusal to answer questions. State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). A "comment" on the defendant's right to remain silent only occurs when the

State uses the accused's silence to suggest to the jury that the refusal to talk is an admission of guilt. Lewis, 130 Wn.2d at p. 707; State v. Henderson, 100 Wn.App. 794, 798, 998 P.2d 907 (2000).

In Lewis the officer testified to a telephone conversation that he had with the defendant in which he told the defendant that "...If he was innocent he should just come in and talk to me about it." The proof at trial was that the defendant never did talk to the officer again. The court in Lewis found that this was not a "comment" on the evidence: Lewis, 130 Wn.2d at p. 706:

> There was not statement made during any other testimony or during argument by the prosecutor that Lewis refused to talk with the police, nor is there any statement that silence would imply guilt. Most jurors know that an accused has a right to remain silent and absent any statement to the contrary by the prosecutor, would probably drive no implication of guilt from a defendant's silence.

Likewise, in State v. Sweet, 138 Wn.2d 466, 480, 980 P.2d 1223 (1999). The court found that there was no comment on the defendant's right to remain silent even though the deputy testified that he had asked the defendant to take a polygraph when he returned to the State of Washington and also testified that the defendant stated that he would be

willing to take the polygraph. This was found not to be a comment on the evidence.

The testimony of Deputy Wilson was not a comment on the defendant's right to remain silent. Deputy Wilson testified that the defendant, when asked if he struck Deputy Haller stated, "I don't want to get into that." There was no objection to the testimony at the time. There was no further comment of any kind regarding this matter. The State did not use that remark for any purpose, let alone refer to it in final argument. This is certainly not a case in which the defendant's silence was used to prove guilt. See State v. Easter, 130 Wn.2d 228, 235, 922, P.2d 1285 (1996) (The arresting officer testified that the defendant was "smart drunk" and characterized the defendant's silence as evasive and evidence of his guilt.); State v. Romero, 113 Wn.App. 779, 791, 54 P.3d 1255, citing to State v. Johnson, 42 Wn.App. 425, 431, 712 P.2d 301 (1985) (no due process violation unless the prosecution unfairly uses post arrest silence against a defendant.)

The trial court in its CrR 3.5 did not authorize the use of the defendant's statement, "I don't want to get into that" as evidence. The court's order authorized admission of the defendant's statements "pursuant

to the rules of evidence." The rules of evidence and the Constitution do permit any comment on the right to remain silent.

An example is found in State v. Pottorff, 138 Wn.App. 343, 156 P.3d 955 (2007). In Pottorff, the officer testified to a conversation that he had with the defendant. The officer testified that the conversation concluded as follows, Pottorff, 138 Wn.App. at p. 346:

> I asked... Mr. Pottorff if he struck [Mr. Taylor] with this cane. Mr. Pottorff said that – he didn't reply. He said that at that time he wanted to invoke his right to remain silent, so we took the cane from him and placed him under arrest for assault.

As in the case at hand, the State in Pottorff did not pursue this remark and did not argue the matter in closing. The court held as follows, Pottorff, 138 Wn.2d at p. 343.

> Here, Officer Davis' direct comment was impermissible, but nothing in the record shows the State exploited the nonresponsive answer for substantive evidence of guilt. The State immediately continued with nonrelated questioning and did not argue the point to the jury. Thus, nothing suggests the jury relied upon Mr. Pottorff's silence as an admission of guilt. *See Lewis*, 130 Wn.2d at 707 (an impermissible comment on a defendant's silence occurs when the State uses a defendant's constitutionally permitted silence to the State's advantage by using it either as substantive evidence of guilt of to

> suggest to the jury that the silence was an admission of guilt).

In the case at hand, the comment was not nearly so direct as the one made in Pottorff. No mention was made of Miranda or the defendant's invocation of his right to remain silent. The only statement from the deputy was that the defendant told him that he "Didn't want to get into that." That statement, at best, is an indirect comment on the right to remain silent. Pottorff, 138 Wn.App. at p. 347, citing to State v. Sweet, 138 Wn.2d at p. 480.

The defendant has shown no prejudice. Even if the court were to assume that this was a comment on the evidence, such an indirect "comment" is reviewed using the lower, non-constitutional, harmless error standard to determine whether no reasonable probability exists that the error affected the outcome. State v. Romero, supra, 113 Wn.App. at p. 791-92, 54 P.3d 1255 (2002). In short, even if this were found to be a comment on the defendant's right to remain silent, there is no reasonable probability that it affected the outcome of this case.

The defendant received effective assistance of counsel. The United States Supreme Court has set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based upon

ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 691, 104 Sup. Ct. 2052, 80 L.Ed.2d, 674 (1984). The Washington Supreme Court has reiterated this standard on many occasions. See State v. Grier, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011).

> Under *Strickland*, ineffective assistance is a two-pronged inquiry:
>
> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction... resulted from a breakdown in the adversary process that renders the result unreliable."

Trial counsel was not ineffective. The remarks made by Deputy Wilson did not constitute a comment on the defendant's right to remain silent. Under the present state of the law, the defendant would not have prevailed on a motion for mistrial. Any objection or request for the jury to disregard the statement would have only called attention to it. As it stood at the time, Deputy Wilson's remarks were, at best, an obscure reference to an invocation by the defendant of his right to remain silent. Wilson's

remarks were never used by any participant in the trial for any purpose, let alone to infer the defendant's guilt. In any event, even if this were to be considered an error on the part of defense counsel, there has been no showing that the defendant was deprived of his right to a fair trial.

This assignment of error must be denied.

The court properly imposed costs and attorney fees. (Response to Assignment of Error No. 2)

To begin with, there are certain mandatory legal financial obligations. The legislature has divested the trial court of any discretion to consider a defendant's ability to pay when imposing these legal financial obligations. This includes Victim Restitution, Crime Victim Assessment, DNA Filing Fee and the Criminal Filing Fee. The legislature has expressly directed that a defendant's ability to pay should not be taken into account when ordering these statutorily mandated costs. State v. Lundy, 176 Wn.App. 96, 101-102, 308 P.3d 755 (2013).

In the present case, almost all of the legal financial obligations imposed are mandatory obligations. The court imposed the following: $500.00 Crime Victim Assessment, RCW 7.68.035; $200.00 Court Costs (Filing Fee), RCW 36.18.020(2)(h); the $100.00 DNA Collection Fee,

RCW 43.43.7541; and Restitution in the amount of $228.03, RCW 9.94A.734(4)(5). The only discretionary financial assessment made in this matter was the $500.00 fee for court appointed counsel.

A challenge to the imposition of such legal financial obligations, including the attorney's fees, is not ripe for review until a State makes an attempt to curtail a defendant's liberty by trying to enforce collection of them. State v. Bertrand, 165 Wn.App. 393, 267 P.3d 571 (2011). The meaningful time to examine a defendant's ability to pay is when the government seeks to collect the obligation. State v. Baldwin, 63 Wn.App. 303, 308-311, 818 P.2d 1116 (1991). There is no requirement that the court determine the defendant's ability to pay at sentencing. State v. Blank, 131 Wn.2d 230, 239-45, 930 P.2d 1213 (1997).

The requirement that a defendant pay attorney's fees for court appointed counsel is not an impermissible infringement upon the defendant's right to counsel. The obligation can only be imposed upon a subsequent finding that the defendant has the ability to pay. State v. Barklind, 87 Wn.2d 814, 557 P.2d 314 (1976).

Contrary to the assertion of the defendant, there is specific statutory authority for the imposition of the cost of court appointed counsel. In particular, RCW 9.94A.760 provides that "Whenever a person

is convicted in Superior Court, the court may order the payment of a legal financial obligation as part of the sentence." The term "legal financial obligation" specifically includes court appointed attorney's fees. RCW 9.94A.030(30).

This assignment of error must be denied.

CONCLUSION

The State asks that the conviction be affirmed.

DATED this 23 day of April, 2014.

Respectfully Submitted,

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GRF/ws

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, v. JEREMY LOYD MCCRACKEN. Appellant.	No.: 45328-2-II **DECLARATION OF MAILING**

DECLARATION

I, Sarah L. Wisdom, hereby declare as follows:

On the 24th day of April, 2014, I mailed a copy of the Brief of Respondent to Backlund & Mistry, P.O. Box 6490, Olympia, WA 98507 by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 24th day of April, 2014, in Montesano, Washington.

Sarah L. Wisdom

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